A **PAN-PACIFIC CONSTRUCTION HOLDINGS SDN BHD**

v.

NGIU-KEE CORPORATION (M) BHD & ANOR

B FEDERAL COURT, KOTA KINABALU
ZAKI TUN AZMI CJ
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
[CIVIL APPEAL NO: 02-11-2008(S)]
C 25 JANUARY 2010

COMPANY LAW: *Members' rights - Oppression - Quasi-partnership joint-venture company - Petition by minority partner under s. 181 Companies Act 1965 to buy out majority partner - Allegation that majority*
D *partner breached fiduciary duties - Whether breach of fiduciary duties automatically amounted to oppression under s. 181(1) - Whether petitioner must prove breach of fiduciary duties amounted to oppression, unfair disregard of its interest or unfairly prejudicial or discriminatory conduct*

E Pan-Pacific Construction Holdings ('the petitioner' in the High Court) had entered into a joint-venture agreement with Ngiu-Kee Corporation ('the 2nd respondent' in the High Court) to form Pacific-Ngiu-Kee S/B ('the 1st respondent company' in the High Court) for the purpose of operating a supermarket/departmental
F store. The petitioner was the minority shareholder with a 30% shareholding whilst the 2nd respondent held 70%. The petitioner appointed three directors to the board, one of whom was the chairman, whilst the 2nd respondent appointed five directors, one of whom was the managing director. The 2nd respondent managed the
G store, and the management committee comprised the managing director, an executive director and a financial controller from the 2nd respondent and two other members from the petitioner.

Disputes subsequently arose between the parties which led to the petitioner taking out a petition under s. 181 Companies Act 1965
H ('CA65') for an order that the 2nd respondent disposed of its 70% shareholding to the petitioner or, alternatively, that the 1st respondent company be wound up. It was alleged that the 2nd respondent had breached the fiduciary duties it owed to the petitioner, and that such breaches came within the purview of
I s. 181(1)(a) and (b) CA65, namely, oppressive conduct, unfair disregard of the petitioner's interest, unfairly discriminatory action and/or prejudicial action. Specifically, the petitioner claimed that:

(i) the 2nd and 3rd respondents had been paying the salaries of three of the employees of the 2nd respondent out of the funds of the 1st respondent company; (ii) that the staff of the 1st respondent company had been assigned to look after the 2nd respondent's other stores; and (iii) the 2nd respondent had charged the 1st respondent company an unjustifiable rate of interest for an unverified RM3.78 million operational loan/advance.

The High Court found for the petitioner and ordered the 2nd respondent to dispose of its majority shares in the 1st respondent company to the petitioner. Central to the High Court's decision was its finding that the 2nd respondent's oppressive conduct/action amounted to a series of incidents which had the cumulative effect of destroying the petitioner's confidence and trust in it as a joint-venture partner. It was held that the losses of the 1st respondent company was partly due to "the manner in which its accounts were loaded with expenses against the company's interests and, consequently, against the interests of the petitioner."

On appeal, the decision of the High Court was reversed. The Court of Appeal held that: (i) the real reason that the petitioner filed the petition was to wrest control of the 1st respondent company; and (ii) the action/conduct of the 2nd respondent did not amount to oppression/dishonesty or an unfair disregard of the petitioner's interest within the meaning of s. 181(1) CA65.

Before the Federal Court, the determinative question that arose for decision was: whether, in conducting the affairs or business of a joint-venture company incorporated under CA65, a breach by one joint-venture partner (of the fiduciary duties that it owes to the other partner) automatically constitutes conduct or action that is proscribed under s. 181(1) CA65?

Held (dismissing the petitioner's appeal)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

[1] In a company (like the 1st respondent company) which is in the nature of a quasi-partnership, a breach - by one partner of the fiduciary duties that it owes to another partner - does not automatically equate to conduct that is proscribed under s. 181(1) CA65 and attract the remedies provided for under s. 181(2) thereof. The critical question was whether the 2nd respondent's breach of its fiduciary duties was unfair to the petitioner within the meaning of s. 181(1) CA65. (paras, 20, 21, 35 & 36)

A **[1a]** The mere breakdown of the quasi-partnership relationship in terms of trust and confidence was not in itself sufficient to justify the grant of relief under s. 181(2) CA65. There is no support in equity "for such a stark right of unilateral withdrawal." (paras 39, 40, 41). Ultimately, it must be shown, B which it was not, that the 2nd and 3rd respondents' breach of their fiduciary duties actually amounted to oppressive conduct, an unfair disregard of the petitioner's minority interests, and/ or conduct that was unfairly discriminatory or prejudicial to the petitioner within the meaning of s. 181(1)(a) and (b) C CA65. (paras 42, 43, 44, 45, 58, 68 & 69)

Per curiam

[1] The central theme of the proscription in s. 181 CA65 is "unfairness in the context of a commercial relationship". It is D a statutory exception to the general rule in *Foss v. Harbottle* that the courts are reluctant to interfere in the internal management of incorporated companies. In a company which is in the nature of a quasi-partnership, however, there is also the added obligation that the partners must act in good faith to one E another. (paras 27, 28, 30, 31 & 32)

[Question of law answered in the negative; decision of Court of Appeal upheld.]

F ***Bahasa Malaysia*** *Translation Of Headnotes*

Pan Pacific Construction Holdings ('pempetisyen' di dalam Mahkamah Tinggi) memasuki perjanjian perniagaan bersama dengan Ngiu-Kee Corporation ('responden kedua' di dalam Mahkamah G Tinggi) untuk menubuhkan Pacific-Ngiu-Kee S/B ('syarikat responden pertama' di dalam Mahkamah Tinggi) bagi tujuan mengendalikan sebuah pasar raya/gedung perniagaan. Pempetisyen adalah pemegang saham minoriti dengan 30% pemegangan saham sementara responden kedua memegang 70%. Pempetisyen telah H melantik tiga pengarah ke lembaga syarikat, salah satunya adalah seorang pengerusi, sementara responden kedua telah melantik lima pengarah, salah satunya adalah seorang pengarah urusan. Responden kedua mengendalikan kedai, dan jawatankuasa pihak pengurusan terdiri daripada pengarah urusan, pengarah eksekutif dan pengawal I kewangan dari responden kedua dan dua lagi ahli dari pempetisyen.

Pertikaian kemudian berbangkit di antara pihak-pihak dan pempetisyen mengeluarkan petisyen di bawah s. 181 Akta Syarikat 1965 ('AS65') untuk perintah bahawa responden kedua melupuskan 70% saham-sahamnya kepada pempetisyen atau, secara alternatif, supaya syarikat responden pertama diguling. Ia didakwa bahawa responden kedua telah melanggar tanggungjawab fidusiarinya ke pempetisyen, dan pelanggaran-pelanggaran tersebut jatuh di bawah s. 181(1)(a) dan (b) AS65, iaitu, tindakan menindas, tidak mempedulikan secara adil hak-hak pempetisyen, tindakan penindasan yang tidak adil dan/atau tindakan secara prejudis. Secara spesifik, pempetisyen mendakwa (i) responden kedua dan responden ketiga telah membayar gaji-gaji tiga pekerja responden kedua dari dana syarikat responden pertama; (ii) pekerja-pekerja dari syarikat responden pertama diberi tanggungjawab untuk mengendalikan kedai-kedai lain kepunyaan responden kedua; dan (iii) responden kedua telah caj syarikat responden pertama kadar faedah yang tidak berdasarkan keadilan bagi RM3.78 juta pinjaman/pendahuluan secara beroperasi yang tidak ditentusahkan.

Mahkamah Tinggi memihak kepada pempetisyen dan memerintahkan responden kedua melupuskan saham-saham majoriti di dalam syarikat responden pertama kepada pempetisyen. Paling utama dalam keputusan Mahkamah Tinggi adalah penemuannya bahawa tindakan/perlakuan menindas membawa ke beberapa kejadian yang mempunyai kesan kumulatif memusnahkan keyakinan dan kepercayaan pempetisyen sebagai rakan kongsi perjanjian perniagaan. Ia diputuskan bahawa kerugian yang dialami syarikat responden pertama adalah sebahagiannya disebabkan "cara bagaimana akaun-akaunnya diselubungi perbelanjaan yang bertentangan dengan kepentingan syarikat dan, oleh itu, bertentangan dengan kepentingan pempetisyen."

Atas rayuan, keputusan Mahkamah Tinggi dibatalkan. Mahkamah Rayuan memutuskan (i) alasan sebenar pempetisyen telah memfailkan petisyen adalah untuk tujuan menguasai syarikat responden pertama; dan (ii) tindakan/kelakuan responden kedua tidak membawa kepada penindasan/ketidakjujuran atau tidak mempedulikan hak-hak pempetisyen di bawah s. 181(1) AS65.

Di hadapan Mahkamah Persekutuan, soalan penentuan yang berbangkit untuk diputuskan adalah: sama ada dalam mengendalikan hal-hal dan perniagaan syarikat usahasama di bawah AS65, pelanggaran oleh satu rakan kongsi (mengenai tanggungjawab fidusiari ke rakan yang lain) secara automatik merangkumi tindakan atau kelakuan yang dilarang di bawah s. 181(1) AS65.

Diputuskan (menolak rayuan pempetisyen)
Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Di dalam syarikat (seperti syarikat responden pertama) yang besifat perkongsian kuasi, pelanggaran - tanggungjawab fidusiari oleh satu rakan kongsi kepada rakan kongsi yang lain - tidak secara automatik disamakan dengan tindakan yang dilarang di bawah s. 181(1) AS65 dan menarik remedi-remedi yang disediakan di bawah s. 181(2). Soalan penting adalah sama ada pelanggaran tanggungjawab fidusiari oleh responden kedua adalah tidak adil terhadap pempetisyen di bawah s. 181(1) AS65.

(1a) Kegagalan memperkukuhkan perhubungan perkongsian kuasi dari segi kepercayaan dan keupayaan tidak memadai untuk menjustifikasikan pemberian relief di bawah s. 181(2) AS65. Tidak terdapat sokongan dalam ekuiti "untuk hak nyata menarikbalik secara unilateral". Ia adalah penting, untuk menunjukkan, tetapi gagal ditunjukkan di sini, bahawa pelanggaran tanggungjawab -tanggungjawab fidusiari responden kedua dan ketiga merupakan tindakan penindasan, tidak mempedulikan secara tidak adil hak-hak minoriti pempetisyen, dan/atau perilaku yang mendiskriminasi dan memprejudiskan pempetisyen secara tidak adil di bawah s. 181(1)(a) dan (b) AS65.

Per Curiam

[1] Pusat tema dalam pengharaman di dalam s. 181 CA65 adalah "ketidakadilan di dalam konteks perhubungan komersial." Ia adalah pengecualian statutori kepada kanun am di dalam kes *Foss v. Harbotle* bahawa mahkamah enggan campurtangan di dalam hal-hal berkaitan pengurusan dalaman syarikat yang diperbadankan. Walaubagaimanapun, di dalam syarikat yang bersifat perkongsian kuasi, ia mempunyai tanggungjawab tambahan di mana rakan-rakan kongsi diwajibkan bertindak dengan suci hati antara satu sama lain.

Case(s) referred to:
Blisset v. Daniel [1853] 68 ER 1022 ***(refd)***
China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***
Foss v. Harbottle [1843] 67 ER 190 ***(refd)***
James Birtchnell v. The Equity Trustees, Executors and Agency Co Ltd [1928-30] 42 CLR 384 ***(refd)***

Jesner v. Jarrad Properties Ltd [1993] BCLC 1032 ***(refd)***
Loch v. John Blackwood Ltd [1924] AC 783 ***(refd)***
Mozley v. Alston [1847] 41 All ER 833 ***(refd)***
Mullins v. Laughton [2003] Ch 250 ***(refd)***
Ngiu-Kee Corporation (M) Bhd & Anor v. Pan-Pacific Construction Holdings Sdn Bhd [2008] 3 CLJ 335 CA ***(refd)***
O'Neil v. Philips [1999] 2 All ER 961 ***(foll)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***
Pender v. Lushington [1877] 6 Ch D 70 ***(refd)***
Re Elgindata Ltd [1991] BCLC 959 ***(refd)***
Re Five Minute Car Wash Service Ltd [1966] 1 WLR 745 ***(foll)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(refd)***
Re Saul D Harrison & Sons plc [1995] 1 BCLC ***(foll)***
Rock Nominees Ltd v. RCO (Holdings) Plc [2004] 1 BCLC 439 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 181(1)(a), (b)
Evidence Act 1950, s. 103

Companies Act 1948 [UK], s. 210
Companies Act 1985 [UK], s. 459
Companies Act 2006 [UK], s. 994

For the appellant - Dr David Fung; M/s Alex Pang & Co
For the respondents - Lim Pitt Kong; M/s PK Lim & Co

[Appeal from Court of Appeal; Civil Appeal No: S-02-372-2006]

Reported by Gan Peng Chiang

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

Introduction

[1] On 29 April 2008 leave was granted to the appellant to appeal against the judgment of the Court of Appeal reversing the decision of the High Court. Five questions were posed for consideration by this court. Having heard the appeal proper judgment was reserved to consider the points involved.

[2] For convenience and to minimize confusion in this judgment the 1st respondent is addressed as 'the company' and the appellant as 'the petitioner'. The 2nd and 3rd respondents remain the same.

[3] As this appeal is focused on the scope and application of s. 181 of the Companies Act 1965 Act (the Act) to proved facts and circumstances, it is only appropriate at the outset to reproduce the relevant portions of the section which read:

181. Remedy in cases of an oppression.

(1) **Any member** or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground

(a) that the **affairs** of the company are being **conducted** or the **powers of the directors** are being **exercised** in a manner **oppressive** to one or more of the **members** or holders of debentures including himself or **in disregard** of his or their **interests as members**, shareholders or holders of debentures of the company; **or**

(b) that **some act of the company** has been **done** or is **threatened** or that **some resolution** of the **members**, holders of debentures or any class of them has been **passed** or is **proposed** which **unfairly discriminates** against or is otherwise **prejudicial** to one or more of the **members** or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that **either** of those grounds is established the Court may, with the view **to bringing to an end** or **remedying the matters complained of**, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may:

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.' (Emphasis added)

Background Facts

[4] The petition was filed on 3 March 2004.

[5] In view of the cause of action relied upon it is of paramount importance that the facts and circumstances leading to the filing of the petition should be set out in proper perspective.

[6] Fortunately in this appeal the task has been made easy. There is no necessity to regurgitate the facts in this judgment since the courts below had already done so. In fact the parties had placed before the learned trial judge a Statement of Agreed Facts which was reproduced in full by the Court of Appeal in its judgment. (See: *Ngiu-Kee Corporation (M) Bhd & Anor v. Pan-Pacific Construction Holdings Sdn Bhd* [2008] 3 CLJ 335).

[7] Notwithstanding, there are some salient facts that should be highlighted for their implications or importance. They are as follows:

(i) that the company is 'in essence a joint-venture company and was formed in order for both the petitioner and the 2nd respondent to operate a departmental store and supermarket at the lower ground, ground, first and second floors, measuring altogether approximately 112,577 sq ft, of a multipurpose complex called Centre Point Sabah, Kota Kinabalu ("the Premises")';

(ii) that the 'formation of the 1st respondent was pursuant to a Joint Venture Agreement in writing entered into on 10 July 1998 between the petitioner and the 2nd respondent';

(iii) that unless otherwise agreed the parties shall ensure that the equity shareholdings in the company shall be held by them in the following proportions:

Pan Pacific 30%

Ngiu Kee 70%

(iv) that unless otherwise agreed the parties shall be entitled to appoint and maintain the following number of directors (including a Chairman and a Managing Director) on the Board of Directors:

Pan Pacific	3 Directors (1 of whom shall be appointed as the Chairman)

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Ngiu Kee	5 Directors (1 of whom shall be appointed as the Managing Director);

(v) that a 'meeting for management committee comprising three representatives from Ngiu Kee who shall be the managing director, an executive director and the financial controller and two representatives from Pan Pacific shall be held every month in respect of the management of the business of the company. The chairman for all such meetings shall be the managing director or in his absence shall be chosen from one of the members present';

(vi) that 'Ngiu Kee shall be responsible for the management of the department store using their knowledge and experience and shall be entitled to call upon the advice and support from Pacific Construction Co Ltd, Republic of China, as and when the need arises'; and

(vii) that the parties agreed that 'the joint venture relationship between the petitioner and the 2nd respondent was akin to partners in a joint venture business under the corporate umbrella' of the company.

[8] Another fact to note is that the parties in 2001 had encountered a dispute. However, an out-of-court settlement was reached on terms including new terms being added to the joint venture agreement, namely,:

(1) that the ratio of shareholding, that is 30% and 70%, shall remain the same;

(2) that with effect from 1 July 2001 the rental rate for the Premises shall be fixed at RM202,638.60 per month representing 112,577 sq ft at RM1.80 per sq ft, and the same rental rate is agreed for eight days per annum for special sales (ie, for these number of days rental shall not be based on the sales turnover as provided under the sublease agreement dated 14 September 2000); and

(3) that the 2nd respondent shall be entitled to be paid 1% of the company's turnover to defray the 2nd respondent's headquarters' overhead.

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Before The High Court

[9] At the commencement of the hearing before the learned trial judge the parties submitted the issues for trial:

1. Whether the matters complained of by the Petitioner constituted a breach or breaches of the fiduciary duty or duties owed to the Petitioner by the 2nd Respondent in the operation of the 1st Respondent's (the Company) affairs or business?

2. If so, whether such breach or breaches of fiduciary duty falls within the scope of Section 181(1)(a) or (b) of the Companies Act, 1965, to constitute oppressive conduct or unfair disregard of the Petitioner's interest as a member and joint venture partner, or is unfairly discriminatory or unfairly prejudicial against the Petitioner?

3. How should the Court bring to an end or remedy the matters complained of?

[10] And bearing in mind the issues for trial the learned trial judge, on the evidence adduced and on the statement of agreed facts, accepted for his consideration the allegations by the petitioner as succinctly summarized by learned counsel for the 2nd respondent thus:

(1) that there has been a clear breach of fiduciary duties by the 2nd and 3rd respondents, ie, not to be placed in a situation of conflict of duty and interest;

(2) that the breach of duty constitutes oppressive conduct or unfair disregard of the petitioner's interests as a member and joint venture partner;

(3) that such conduct is unfairly discriminatory or unfairly prejudicial against the petitioner;

(4) that such conduct has destroyed the mutual trust and confidence in their relationship.

[11] In turn three matters out of the several assertions submitted by the petitioner were therefore considered by the learned trial judge as pertinent to determine whether the foregoing allegations were substantiated. They are:

1. the loan of RM3.78 million and the interest charged;

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2. charging to the Company the salaries of three staffs of the 2nd Respondent; and

3. using the Company's staff to look after the affairs of the 2nd Respondent's store in Lawas, Sarawak.

B **[12]** In his judgment the learned trial judge gave judgment to the petitioner. He allowed several orders prayed for including an order that the petitioner, although a minority shareholder, would buy out the 2nd respondent the majority shareholder. Restitution orders were also made against the 2nd respondents.

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[13] Briefly, the learned trial judge held that the petitioner had established the three matters asserted to support the allegations. He described them as series of incidents each resulting to the detriment of the petitioner while to the advantage of the 2nd respondent. D Their cumulative effect according to the learned trial judge 'is to make any partner of the 2nd respondent very wary of their behavior and justifiably to lose confidence in them' which was made worse by the cavalier attitude of the 3rd respondent towards the company and the petitioner. He also found that the 3rd respondent was prepared E to say anything regardless of the truth including casting aspersion against others when she said that the accounts of the company was fabricated in the earlier years of operation in order to show profits.

[14] The learned trial judge also opined that in such a situation it F would be difficult to expect the petitioner to continue to have 'confidence and trust in the 3rd person and consequently in the 2nd respondent, since the 3rd respondent is in effective charge of both the company and the 2nd respondent'. He said that the losses of the company was partly due to 'the manner in which the account G was loaded with expenses against the company's interest and consequently against the interests of the petitioner'.

[15] Indeed it was the overall view of the learned trial judge that whatever steps taken by the respondents as for instance in fine tuning the purchase system and lending money when the company H was in need of financial assistance, were reciprocated by those acts complained of by the petitioner which were used as 'tools to oppress the petitioner and to disregard the interest of the petitioner'.

[16] The learned trial judge did not accept the contention that the I allegations made by the petitioner were baseless and aimed at wresting control of the company.

Before The Court Of Appeal

[17] Dissatisfied with the decision of the learned trial judge the 2nd and 3rd respondents appealed.

[18] The Court of Appeal reversed the decision of the learned trial judge with the following conclusions, *inter alia*:

(i) that the real reason for the filing of the petition was to enable the petitioner to wrest control of the company as could be elicited from the correspondences exchanged between the parties which the learned trial judge erroneously failed to take into account;

(ii) that the petitioner failed to prove that the actions of the 2nd respondent had oppressed or had the effect of disregarding its interests as overall the circumstances and matters complained of by the petitioner did not at all amount to oppression within the meaning of s. 181(1) of the Act;

(iii) that there was nothing to show that the action of the 2nd and 3rd respondents complained of was designed to injure the petitioner in its rights as a member;

(iv) that the petitioner had failed to prove that the directors representing the respondents had acted in disregard of the petitioner's interests. Based on the minutes of the board of directors meeting, the directors representing the 2nd respondent did not simply ignore or brush aside any query raised by the directors representing the petitioner;

(v) that there was nothing to suggest that the company was not being conducted efficiently by the existing board of directors in the interests of the members;

(vi) that neither was there any violation of the conditions of fair play or any abuse of power being committed by the directors of the respondents which could amount to oppression; and

(vii) that oppression must be in the form of dishonesty and in the instant case, there was none.

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Before This Court

[19] The five questions posed for consideration by this court are:

Question 1:

B

Whether an appellate court can proceed to hear and decide an appeal based on a case that is different from and not advanced by the party in the cause at the hearings at first instance and on appeal? (Ground 1-5);

Question 2:

C

Whether a breach of fiduciary duty committed by one joint-venture partner as against the other partner in operating the affairs or business of a joint-venture company incorporated under the Companies Act 1965 can constitute conduct proscribed under section 181(1)(a) or (b) of the Companies Act? (Ground 6);

D

Question 3:

Whether the Court can bring to an end or remedy the matters complained of under section 181(1) by granting an order that the petitioner being the minority shareholder of the joint-venture company purchase the shares of the majority shareholder pursuant to powers under section 181(2) of the Companies Act? (Ground 7);

E

Question 4:

F

Whether the Court can remedy the matters complained of under section 181(1) by granting the remedy or relief, ancillary or otherwise, of declaration, restitution or compensation? (Ground 8);

Question 5:

G

Whether it is the duty of a party to cross-examine a witness called by another party on an assertion attributed to the witness and only contained in a document where the assertion taken contemporaneously with the other parts of the document and the surrounding circumstances is ambivalent, equivocal and non-conclusive? (Ground 9).

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[20] Of the five questions posed Question 2 is determinative. A negative answer to it would render the other Questions academic and need not be answered. But in considering Question 2 it is appropriate to address simultaneously Question 1.

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[21] Accordingly the core issue to consider is whether the petitioner is correct in law to assert that in a company which is in the nature of quasi-partnership with its members owing fiduciary duties to one another, breach of such duties would be sufficient to invoke the remedy under s. 181 of the Act.

[22] But in order to better appreciate the core issue it may be appropriate to first examine the principles of law on the application of s. 181 in relation to a company which is not in the nature of quasi-partnership. Meanwhile, it is trite law that in order to succeed in its petition the burden is upon a petitioner on the balance of probability to establish all the elements required to be proven under s. 181.

[23] This court in *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716 briefly reviewed the genesis of judicial intervention in the internal affairs of incorporated companies. It said that 'Traditionally, courts have been reluctant to interfere with matters relating to the internal management of incorporated companies ... Two landmark decisions settled the law upon the subject for all time. The first of these was *Foss v. Harbottle* [1843] 67 ER 190; the second was *Mozley v. Alston* [1847] 41 All ER 833 ... In time it was accepted that what has come to be known as the rule in *Foss v. Harbottle*.'

[24] The judgment went on to say that the effect of such legislative provisions as s. 210 of English Companies Act 1948 (later s. 459 of the UK Companies Act 1985 and presently s. 994 UK Companies Act 2006) which is similar but not in *pari materia* with s. 181 of the Act which is wider in scope, 'was not to abrogate but to introduce limited exceptions to the rule in *Foss v. Harbottle*'. Thus, it is fair to say that oppression for instance in company law is not a free-floating common law concept but a legislative creature.

[25] Therefore, in order to succeed in its petition pursuant to s. 181 the petitioner has to establish and 'must eminently be determined according to the facts' of this case that the affairs of the company are being conducted or that the powers of the directors are being exercised in an oppressive manner or in disregard of its interests, or to its prejudice some unfairly discriminatory or prejudicial act of the company has been done or threatened, or that some resolutions of the members, debenture holders or any class of them has been passed or is proposed to be passed.

[26] In other words s. 181 permits judicial remedy on four categories of conduct, namely, oppressive conduct, conduct in disregard of interests, unfairly discriminatory conduct or prejudicial conduct.

[27] It may also be noted that from the wordings of s. 181 its basic theme is 'unfairness'. However, unfairness 'does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. "The court ... has a very wide discretion, but it does no sit under a palm tree"'. (See: *O'Neil v. Philips* [1999] 2 All ER 961).

[28] In *Re Saul D Harrison & Sons plc* [1995] 1 BCLC it was explained (Hoffmann LJ [as he then was]) that in 'deciding what is fair or unfair for the purposes of s. 459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s. 459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association ... The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole ... But the fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of s. 459'.

[29] Thus, in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170 the term 'disregard of interests' is to be understood to mean 'unfair disregard' while 'oppression' denotes an 'unfairly prejudicial conduct' which means a conduct 'departing from standards of fair dealing and a violation of conditions of fair play'. But 'a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the

affairs of the company should be conducted'. And 'trivial or technical infringements of the articles were not intended to give rise to petitions under s. 459'. (See: *Re Saul D Harrison & Sons Plc (supra)*.

[30] The principles of law are therefore quite settled in a non-quasipartnership company. However, where it is (in the nature of quasi-partnership) as in this case there is an added factor which members are obliged in law to observe, namely, to act in good faith to one another.

[31] So, as between the petitioner and the 2nd respondent there existed fiduciary duties between them as in a partnership. In *James Birtchnell v. The Equity Trustees, Executors and Agency Co Ltd* [1928-30] 42 CLR 384 Dixon J said that the 'relationship between partners is, of course, fiduciary.' Thus, they are expected to act in good faith to one another. (See: *Mullins v. Laughton* [2003] Ch 250; *Blisset v. Daniel* [1853] 68 ER 1022).

[32] And such special relationship between the petitioner and the 2nd respondent entails the application of equitable considerations or constraints as may be derived from the laws of partnership which make it unfair for the 2nd respondent when conducting the affairs of the company to rely on its strict legal powers. Unfairness in this context may be in the form of a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith as for instance, where 'the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed' or 'exchanged' (see: *O'Neil v. Philips (supra)*) before or after they have entered into association.

[33] Further, it is not 'necessary that such promises should be independently enforceable as a matter of contract'. (See: *O'Neil v. Philips (supra)*.

[34] The above is of course quite a departure from the general principle in company law ('the majoritarian approach') that there is no general duty of good faith owed by shareholders in a company to each other. A share is a property which its holder as of right is entitled to utilize it in any manner he may wish. (See: *Pender v. Lushington* [1877] 6 Ch D 70; *Foss v. Harbottle (supra)*). (See also: 'Fairness and Good Faith as a precept in the *Law of Corporations And Other Business Organizations* by Charles W Murdock, Vol. 36 Loyola University Chicago Law Journal 551 [2004-2005]').

[35] Accordingly, premised on the agreed fact that the relationship of the petitioner and the 2nd respondent 'was akin to partners in a joint venture business under the corporate umbrella' of the company and on the principles of law aforementioned, the petitioner went on to postulate thus: that upon proof of breach or breaches of fiduciary duties resulting in it losing trust and confidence in the 2nd respondent and which in turn destroys the mutual trust and confidence between them, that 'would and do constitute conduct proscribed under s. 181 of the Companies Act, being conduct which is oppressive, unfairly disregarding the petitioner's interest, unfairly discriminatory or unfairly prejudicial' against it.

[36] With respect, such hypothesis appears to ignore the basic requirements of s. 181. Accepting that there might have been breaches of fiduciary duties the question to ask is whether such breaches were unfair to the petitioner. The reason is that in the first place there is no basis to imply from the wordings of the section that mere proof of breach or breaches of fiduciary duties would constitute the conduct proscribed.

[37] Indeed even in a winding up petition on the 'just and equitable' rule it was held that there must be 'a **justifiable** lack of confidence in the conduct and management of the company's affairs'. And such lack of confidence 'must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of **probity** in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable, that the company be wound up' - *Loch v. John Blackwood Ltd* [1924] AC 783. (Emphasis added). (See also: *Jesner v. Jarrad Properties Ltd* [1993] BCLC 1032).

[38] And it is to be noted that *O'Neil v. Philips (supra)* held inferentially that the principles governing winding-up on the just and equitable basis applied equally in the context of the unfair prejudice remedy.

[39] On the issue of breakdown of trust and confidence between parties in a quasi-partnership company, Lord Hoffmann in *O'Neil v. Philips (supra)* said that there is no 'support in the authorities for such a stark right of unilateral withdrawal' when he rejected the

contention that due to the breakdown of trust and confidence between the parties there ought to be a parting of ways and it would be unfair to leave a party locked into the company as a minority shareholder.

[40] The House of Lords implied that the mere fact of breakdown in the relationship in terms of trust and confidence was not in itself sufficient to justify the grant of relief under s. 459 on the basis of traditional equitable principles. Thus, the falling apart of the parties in a quasi-partnership company does not mean that the majority should be assumed to have broken any material agreements or understandings which are enforceable in equity or assumed to have behaved in such a way as equity would regard as in bad faith. (See also: *Re Five Minute Car Wash Service Ltd* [1966] 1 WLR 745 at p. 751).

[41] It has also been held that merely establishing that a respondent has, in breach of its fiduciary duty brought about a transaction involving the assets of the company which had benefited the majority shareholder would not suffice to enable a petitioner to obtain an order under s. 459 of the English Companies Act 1985 unless the petitioner could show that it had suffered loss by reason of the transaction. (See: *Rock Nominees Ltd v. RCO (Holdings) plc* [2004] 1 BCLC 439).

[42] Premised therefore on the foregoing discourse there is merit in the submission of learned counsel for the respondent when he submitted:

(i) that in order for the petitioner to succeed it is not enough to merely 'raise or establish that there was any breach of any fiduciary duty or duties but must also establish that any such breach (if any) constitutes oppressive conduct, conduct in disregard of interest, unfairly discriminatory conduct or prejudicial conduct' within the scope of s. 181(1)(a) or (b) of the Act; and

(ii) that in the final analysis the question whether there is oppression, disregard, unfair discrimination or whether the act complained of is prejudicial is one that must be determined according to the facts of each particular case.

[43] As such, strictly as a matter of law, the above discourse should negate the preposition of law which the petitioner wants this court to accept.

[44] For the petitioner to merely declare, without more, as in this case that it has lost its trust and confidence in the 2nd respondent in managing the company due to the latter breaches of its fiduciary duties towards the petitioner, is not a sufficient proof against the 2nd respondent of conduct being oppressive, unfairly disregarding the petitioner' interests, unfairly discriminatory or unfairly prejudicial against the petitioner for the purpose of s. 181.

[45] Thus, Question 2 should be answered in the negative which in turn makes Question 1 quite irrelevant **in law** and need not be specifically answered. (Emphasis added).

[46] However, for completeness it is prudent to consider the differing findings of the courts below on the three matters which are factual issues distilled by the learned trial judge as having substantiated the allegations of the petitioner.

[47] To begin, it should be noted that the critical findings of the learned trial judge were mainly derived by way of inferences and summations from the primary facts which were not in dispute. It was therefore in order for the Court of Appeal to examine his findings on the three matters. (See: *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163). This alone should answer Question 1.

[48] Overall, the judgment of the Court of Appeal did consider all the issues involved *albeit* not in the fashion the petitioner might have desired. There is therefore no basis to say that the Court of Appeal failed to consider the threshold first Issue for Trial.

[49] Admittedly there is no direct finding or conclusion on the issue of fiduciary duties and breaches thereof in the judgment of the Court of Appeal. However, unlike the learned trial judge, the initial negative findings of the Court of Appeal on the three matters made it unnecessary to grant the declaration on breaches of fiduciary duties as prayed for by the petitioner.

[50] In fact even the learned trial judge in his judgment did not address the issues for trial in the same order as submitted by the parties. What the learned trial judge did was to first consider the three matters referred to at para. 11 above. He described them as series of incidents despite there being only three before him. He held that they were established and detrimental to the interests of the petitioner in the company but advantageous to the 2nd

respondent. He also concluded that the cumulative effect of the series of incidents had made the petitioner being a partner very wary of the behavior of the 2nd respondent and thus justified it to lose trust and confidence in them.

[51] Now going into the specific factual matters, the advance of RM3. 8 million given by the 2nd respondent to the company was made in order to assist the latter financially since loans from the banks were not forthcoming. So the advance itself should not by any stretch of imagination be described as oppression or prejudicial to the interests of the petitioner. And surely such move by the 2nd respondent, bearing in mind its special relationship with the petitioner, cannot be described as evidence of bad faith or lack of probity in the conduct of the company's affairs. The only controversial issue connected to the advance was the sum RM861,366.35 which was alleged to have been unverified.

[52] No doubt the initial report of the auditor (Ernst & Young) engaged to examine the advance did disclose that such sum was unsupported by documents. However, even the learned trial judge did not come to a definite finding on the point. All he said was that 'whether the sum of RM861,000 had been reconciled as asserted by Liew Tuck Wah (the area manager of the company) depends very much on the auditor's confirmation for which Liew Tuck Wah was supposed to obtain for tabling at the next board meeting. There is no evidence as to whether the auditor will or will not confirm the reconciliation' ... If Liew Tuck Wah's assertion that the account had been reconciled is true and confirmed by the auditor, that would be the end of the matter'. The issue therefore remained an open question.

[53] Notwithstanding, the learned trial judge proceeded to conclude that 'the petitioner was justified in being suspicious and for feeling that something was amiss which the auditor confirmed' because 'the accounts were kept and kept by the same internal accountant working for the company, the 2nd respondent and another company called Maestro Products Sdn Bhd,' and that such manner in keeping the accounts 'do make out a *prima facie* case that they had been kept to the disadvantage of the company and thus to the detriment or disregard of the interests of the petitioner and that also explained their lack of urgency in resolving the matter of the said deficit amount'. And he went on to hold that for such reason it was not unreasonable for the petitioner to lose its trust and confidence in the 2nd respondent as a partner of the joint venture enterprise.

[54] The Court of Appeal on same matter held that the petitioner, having the onus of proof, failed to establish that the amount had not been verified and that the amount had been siphoned out of the company for the benefit of the 2nd respondent. It went on to say that mere suspicion or deficiency in keeping the accounts of the business was not enough.

[55] Based therefore on the facts as found and the findings of the courts below it would appear that the petitioner's action was premature. It could have waited for the next board meeting in order to find out if indeed the sum had been reconciled. Even the learned trial judge was aware of such possible development. He said that 'If Liew Tuck Wah's assertion that the account had been reconciled is true and confirmed by the auditor, that would be the end of the matter'. An opportunity to resolve the puzzle was also missed when neither of the party enquired from the relevant witnesses called during the hearing of the petition. And since it was the petitioner which was asserting the irregularity on the advance the burden is cast upon it to establish such assertion. (See: s. 103 Evidence Act 1950).

[56] Further, it should be noted that the point was on the assertion of unverified sum of RM861,000 and not on how the accounts of the company was kept which the learned trial judge took note of. It is also noteworthy that the learned trial judge did not rely on the keeping of the accounts of the company as indicative of bad faith or lack of probity on the part of the respondents. Neither did he make any finding of fact to that effect. At most he inferred was that 'petitioner was justified in being suspicious and for feeling that something was amiss' and that such manner in keeping the accounts 'do make out a *prima facie* case that they had been kept to the disadvantage of the company and thus to the detriment or disregard of the interests of the petitioner'.

[57] Obviously the learned trial judge was carried away by a subsidiary fact that the same accountant kept the accounts of the company, the 2nd respondent and Maestro Products Sdn. Bhd. But such arrangement could be changed by the board of directors of the company if necessary thereby rendering irrelevant any allegation of conduct proscribed by s. 181. As such the learned trial judge had no good reason in the context of s. 181 to come to his conclusion as he did.

[58] There was therefore hardly any factual basis for the learned trial judge to conclude that the respondents in managing the affairs of the company had not acted in good faith or there was lack of probity or acted to the detriment or disregard of the interests of the petitioner thereby justifying the petitioner to lose its trust and confidence in them. Though it is open to the court to find that serious mismanagement of a company's business constitutes conduct that is unfairly prejudicial to the interests of the shareholders the court will normally be very reluctant to accept that managerial decision can amount to unfairly prejudicial conduct. (See: *Re Elgindata Ltd* [1991] BCLC 959 at 993).

[59] In respect of the interest charged in connection with the advance given, it was in evidence that it had been resolved within the company. However, the learned trial judge said that the resolution did not end the petition since what was being attacked was the manner in which the affairs of the company were being conducted. And he also held that the attempt to explain that the charge of 3% was for freight charged incurred on centralized purchasing was a clear admission that the accounts as kept did not reflect the actual nature of the transaction, a behaviour not expected from a joint venture partner.

[60] The Court of Appeal on this sub-matter held that the rate of interests charged for the advance had been agreed by the board of directors of the company chaired by the chairman who was the principal representative of the petitioner in the board.

[61] Thus, the approach taken by the learned trial judge is clearly unsustainable. The foregoing matter could hardly be a justification to find that the elements of s. 181 were satisfied on any account let alone any finding of lack of good faith or lack of probity on the part of the respondents.

[62] In respect of salaries of staff of the 2nd respondent being paid from the accounts of the company the learned trial judge found that there was no basis to utilize the money of the company since a yearly fee of 1% based on the company's turnover was already payable to the 2nd respondent. And although it was subsequently stopped the learned trial judge said that it only indicated that the petitioner had to be vigilant and continuously on guard in the management of the finances of the company by the respondents.

[63] On this matter the Court of Appeal held that the arrangement was known to the board of directors of the company. It was also acknowledged that the company saved RM1.8 million as a result of the arrangement.

[64] The arrangement had ceased. It could not be described as conduct oppressive or unfairly prejudicial to the interests of the petitioner since in reality no loss was suffered by the petitioner or the company. (See: *Rock Nominees Ltd v. RCO (Holdings) Plc (supra)*. Further, since the board of directors of the company was kept informed of the arrangement and in view of the saving made there was no basis to conclude that there was lack of probity or good faith in the management of the company by the respondents.

[65] In respect of the use of the company staff to look after the affairs of the lawas store that was wholly owned by the 2nd respondent, a fact which the 3rd respondent considered as trivial, the learned trial judge held that it showed the 2nd respondent and the 3rd respondent had conducted the affairs of the company in a manner oppressive to the petitioner and in disregard to its interests.

[66] However, the Court of Appeal held that the use of the company staff to take care of the Lawas store of the 2nd respondent did not amount to oppression. It had stopped. The Lawas store had been asked to reimburse the salaries paid to the staff.

[67] As this particular matter had ceased and since a repeat of it would be very unlikely, it could not be said that such conduct amounted to oppression or unfairly prejudicial or disregard to the interests of the petitioner. It should also be borne in mind that 'trivial or technical infringements of the articles were not intended to give rise to petitions under s. 459'. (See: *Re Saul D Harrison & Sons Plc (supra)*. A *fortiori*, in this case the petitioner is still being represented in the management of the company and a repeat of such activity should not escape the attention of those representing it.

Conclusion

[68] Accordingly on the facts and circumstances of this case and bearing in mind the discourse on the three matters listed in para. 11 hereinabove the Court of Appeal was correct in its conclusion that the petitioner had failed to prove its case. At any rate the allegations and the three matters advanced to substantiate

them even if proven were trivial for the purpose of s. 181 of the Act. Further, even accepting that the sum of RM861,000 remains an open question, it is quite unjustified to say that in granting the advance the 2nd respondent had breached its fiduciary duties towards the petitioner and thus satisfied the elements of s. 181. The only apparent ground which this petition is based is the unilateral declaration by the petitioner that it has lost its trust and confidence in the respondents in managing the company. However as shown above such preposition has no judicial precedent in support.

[69] Accordingly, as in law, even on the facts and circumstances of this case the answer to Question 1 is in the affirmative and to Question 2 is in the negative. It follows that Questions 3, 4 and 5 are now academic and need not be answered.

[70] This appeal is therefore dismissed with costs.